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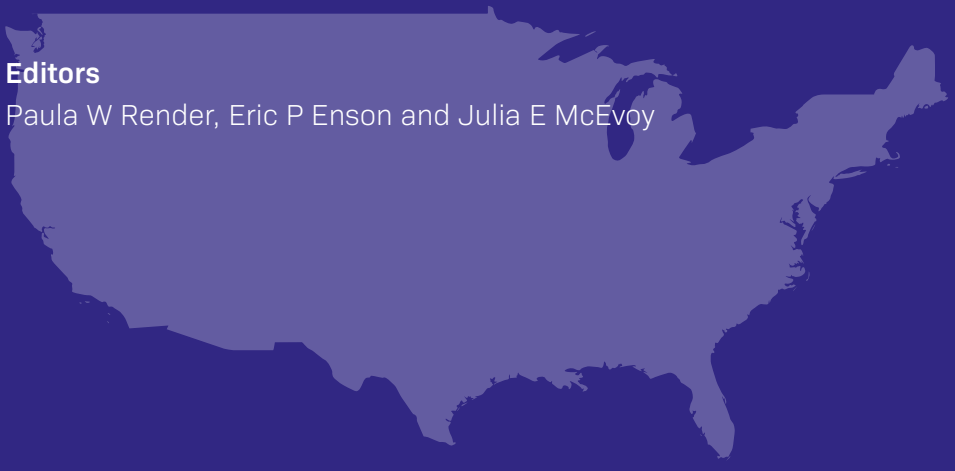

Editors
Paula W Render, Eric P Enson and Julia E McEvoy

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Preface

Global Competition Review is a leading source of news and insight on competition law, economics, policy and practice, allowing subscribers to stay apprised of the most important developments around the world.

Alongside the daily content sourced by our global team of reporters, GCR also offers deep analysis of longer-term trends provided by leading practitioners from around the world. Within that broad stable, we are delighted to launch this new publication, *US Courts Annual Review*, which is our first to take a very deep dive into the trends, decisions and implications of antitrust litigation in the world's most significant jurisdiction for such cases.

The content is divided by court or circuit around the US, allowing our valued contributors to analyse both important local decisions and draw together national trends that point to a direction of travel in antitrust litigation. Both oft-discussed developments and infrequently noted decisions are thus surfaced, allowing readers to comprehensively understand how judges from around the country are interpreting antitrust law, and its evolution.

In producing this analysis, GCR has been able to work with some of the most prominent antitrust litigators in the US, whose knowledge and experience has been essential in drawing together these developments. That team has been led and indeed compiled by Paula W Render, Eric P Enson and Julia E McEvoy of Jones Day, whose insight, commitment and know-how have been fundamental to fostering the analysis produced here. We thank all the contributors, and the editors in particular, for their time and effort in compiling this report.

Although every effort has been made to ensure that all the matters of concern to readers are covered, competition law is a complex and fast-changing field of practice, and therefore specific legal advice should always be sought. Subscribers to Global Competition Review will receive regular updates on any changes to relevant laws during the coming year.

If you have a suggestion for a topic to cover or would like to find out how to contribute, please contact insight@globalcompetitionreview.com.

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June 2020

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Eleventh Circuit

David Kully and Anna Hayes
Holland & Knight LLP

A move toward greater clarity in application of state-action immunity

In *Parker v Brown*, the Supreme Court recognized for the first time that, because 'states are sovereign' and there is no indication that when Congress adopted the Sherman Act it intended to restrain their activities, states are immune from antitrust liability.[1] The holding in *Parker* has subsequently become known as the 'state-action doctrine' and the immunity it conferred, 'state-action immunity.' State-action immunity does not necessarily extend to political subdivisions of states or to entities purporting to act pursuant to the authority of the state. Municipalities, for instance, 'are not beyond the reach of the antitrust laws by virtue of their status because they are not themselves sovereign.'[2] Similarly, '[s]tate agencies are not simply by their governmental character sovereign actors for purposes of state-action immunity.'[3]

In 2019, courts in the Eleventh Circuit considered several cases testing the limits of state-action immunity. Going forward, these decisions should provide greater clarity to litigants – including governmental entities in the Eleventh Circuit seeking the protection of state-action immunity.

Diverse Power: The end of a journey in determining applicability of state-action immunity to non-sovereign political subdivisions of states

In August 2019, the Eleventh Circuit in *Diverse Power, Inc v City of LaGrange* affirmed the denial of a motion to dismiss antitrust claims brought by an independent electricity provider against the city of LaGrange, Georgia.[4] The court rejected the municipality's argument that it was immune from antitrust liability under the state-action doctrine. This case was not the first time that the author of the opinion, Judge Tjoflat, had considered the applicability of the state-action doctrine to activities of non-sovereign political subdivisions of a state. In 2011, Judge Tjoflat wrote an opinion

1 317 U.S. 341, 350–51 (1943).

2 *Town of Hallie v City of Eau Claire*, 471 U.S. 34, 38 (1985).

3 *N.C. State Bd. of Dental Examiners v FTC*, 574 U.S. 494, 505 (2015).

4 934 F.3d 1270, 1271 (11th Cir. 2019).

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for the Eleventh Circuit finding that a local hospital authority (which owned a large hospital) was immune from an antitrust challenge to the authority's acquisition of its leading competitor pursuant to the state-action doctrine.[5] But, as Judge Tjoflat observed in *Diverse Power*, '[w]e got reversed, nine-zip'[6] by the Supreme Court in its 2013 decision in *FTC v Phoebe Putney Health System, Inc*,[7] which appeared to tighten the standard for applicability of state-action immunity to non-sovereign political subdivisions of states.[8]

Judge Tjoflat's journey from *Phoebe Putney I* to *Diverse Power* provides a helpful roadmap for the sometimes less-than-clear legal landscape for the applicability of state-action immunity to municipalities or other political subdivisions of states.[9]

Diverse Power overview

The City of LaGrange, Georgia, operates a utility that is the sole provider of both water and natural gas services both within city limits and in Troup County, outside city limits. In Troup County, LaGrange's natural gas service is 'in direct competition for retail energy customers' with electric power supplied by Diverse Power.[10]

In 2004, LaGrange adopted an ordinance under which the availability of water service to new homes built outside of the city would be conditioned on the installation of natural gas fixtures. As the court observed, '[t]he purpose of the Ordinance [was] clear': to use water service, for which LaGrange had no competition, as 'leverage' to require builders and customers to select gas as an energy source over Diverse Power's competing electricity offering.[11] Based on a comparison of homes in Troup County built before and after LaGrange adopted the ordinance, the ordinance produced the desired outcome: homes on the south side of a road in Troup County constructed before the ordinance existed were built to use electricity for all appliances; homes on the north side of the road built after LaGrange adopted the ordinance were built for natural gas appliances.[12] The court recognized that this did not prove conclusively that the ordinance caused builders to choose natural gas over electricity, but found other evidence to be highly supportive of the point: '[L]est one suspect that market forces drove this strange arrangement, the developer told Diverse Power that, but for the Ordinance, it would have built the houses on the north side of the road to use electric rather than natural gas appliances.'[13]

5 See *FTC v Phoebe Putney Health Sys., Inc.*, 663 F.3d 1369, 1378 (11th Cir. 2011) (*Phoebe Putney I*, rev'd, 568 U.S. 216 (2013)).

6 934 F.3d at 1275.

7 568 U.S. 216 (2013) (*Phoebe Putney II*).

8 *Id.* at 236.

9 See *Town of Hallie v City of Eau Claire*, 471 U.S. 34, 46 (1985) ('It is fair to say that our cases have not been entirely clear.').

10 *Diverse Power*, 934 F.3d at 1271.

11 *Id.*

12 *Id.* at 1272.

13 *Id.*

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Diverse Power brought an antitrust suit against LaGrange in 2017, alleging that LaGrange engaged in illegal tying by 'conditioning water service on the installation of natural gas appliances.'[14] LaGrange claimed it was immune from liability under the state-action doctrine and moved to dismiss the case, but the district court denied the motion.[15] LaGrange's appeal provided Judge Tjoflat an opportunity to revisit state-action immunity issues as applied to non-sovereign political subdivisions of states. His past experience with these issues informed his approach in *Diverse Power*, and reveals the challenge courts and parties face in determining whether state-action immunity applies.

A look back: State-action immunity in the Eleventh Circuit's decision in Phoebe Putney

The *Phoebe Putney* litigation concerned a challenge by the Federal Trade Commission (FTC) to the acquisition by a hospital in Albany, Georgia, of its 'only real competitor.'[16] The case presented state-action immunity questions because the acquiring hospital, Phoebe Putney, was owned by the Hospital Authority of Albany-Dougherty County (the Hospital Authority), a public entity formed by city and county governments pursuant to a Georgia statute that empowered the authority to engage in a variety of hospital-related activities, expressly including the acquisition of other hospitals.[17] In 2011, the Hospital Authority approved the acquisition by Phoebe Putney's operating entity to acquire Palmyra Park Hospital, and the FTC sued to block the transaction shortly thereafter, alleging that the transaction would create a monopoly in the provision of inpatient general acute-care hospital services in Dougherty County.[18]

The district court dismissed the FTC's claims, finding the Hospital Authority immune from antitrust liability under the state-action doctrine, and the Eleventh Circuit affirmed.[19] The Eleventh Circuit explained that a non-sovereign political subdivision of a state, such as the Hospital Authority, could receive state-action immunity only if the state authorized it to perform the challenged activity and the state 'ha[d] clearly articulated a state policy authorizing anticompetitive conduct.'[20] The Eleventh Circuit stated that the requirement that the state clearly articulate its intention to displace competition did not require an explicit statement in the statute or legislative history that the state 'intend[ed] for the delegated action to have anticompetitive effects.'[21] Rather, the Eleventh Circuit explained, the clear articulation requirement could be satisfied if the anticompetitive conduct was a 'foreseeable result' of the legislation.[22]

14 *Id.*

15 *Id.*

16 See *Phoebe Putney I*, 663 F.3d 1369, 1373 (11th Cir. 2011).

17 *Id.* at 1372–73.

18 *Id.* at 1373.

19 *Id.* at 1377.

20 *Id.* at 1375 (citing *FTC v Hosp. Bd. of Dirs. of Lee Cnty.*, 38 F.3d 1184, 1187–88 (11th Cir. 1994)).

21 *Id.* (quoting *Town of Hallie v City of Eau Claire*, 471 U.S. 34, 43 (1985)).

22 *Id.* at 1375–76 (quoting *Hallie*, 471 U.S. at 42).

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The Eleventh Circuit found that, by authorizing hospital authorities to acquire hospitals, 'the Georgia legislature must have anticipated anticompetitive harm' because it was foreseeable that 'acquisitions could consolidate ownership of competing hospitals, eliminating competition between them.'[23] Many acquisitions, such as the combination of relatively small hospitals in a market with many competitors, would likely raise no competitive issues. But the court, in an opinion by Judge Tjoflat, believed that it would 'def[y] imagination to suppose the legislature could have believed that every geographic market in Georgia was so replete with hospitals that authorizing acquisitions by the authorities could have no serious anticompetitive consequences.'[24] In other words, the legislature must have foreseen that, in allowing hospital acquisitions, hospital authorities might engage in anticompetitive acquisitions. The Court therefore concluded that 'through the Hospital Authorities Law, the Georgia legislature clearly articulated a policy authorizing the displacement of competition.'[25]

As Judge Tjoflat later observed, the Eleventh Circuit was reversed, 'nine-zip' at the Supreme Court.[26]

Foreseeability standard before the Supreme Court's Phoebe Putney decision

In *Diverse Power*, Judge Tjoflat notes correctly that 'it's hard to argue that' the Supreme Court's decision in *Phoebe Putney*, reversing the Eleventh Circuit, 'naturally follows from' preceding Supreme Court decisions interpreting the clear articulation requirement.[27] In prior decisions, the Supreme Court interpreted fairly broadly the potential anticompetitive consequences states likely would have foreseen when they delegated power to municipalities or other non-sovereign political subdivisions. Under these decisions, Phoebe Putney's acquisition of its competitor likely would have been immune from antitrust challenge under the state-action doctrine.

In *Hallie*, for instance, the city of Eau Claire, Wisconsin, refused to provide sewage treatment services to neighboring towns that lacked treatment facilities unless those towns also agreed to use Eau Claire's sewage collection and transportation services.[28] The neighboring towns alleged that Eau Claire sought to use its monopoly over sewage treatment to obtain a monopoly over sewage collection and transportation, activities in which the towns competed with Eau Claire.[29]

23 *Id.* at 1377.

24 *Id.*

25 *Id.*; see also *Diverse Power, Inc. v City of LaGrange*, 934 F.3d 1270, 1275 (11th Cir. 2019) ('[B]ecause it appeared clear that the power to acquire hospitals in markets with few hospitals reasonably anticipated the power to anticompetitively consolidate the hospital-services market, we affirmed the District Court's order granting state-action immunity.').

26 *Diverse Power*, 934 F.3d at 1275 (citing *Phoebe Putney II*, 568 U.S. 216, 226–27 (2013)).

27 *Id.*

28 *Town of Hallie v City of Eau Claire*, 471 U.S. 34, 37 (1985).

29 *Id.*

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Eau Claire raised state-action immunity as a defense and asserted that the state clearly articulated its intention to displace competition when it authorized cities to construct sewage systems and to 'fix the limits of such service' to particular areas.[30]

Although the state statute was silent on the question of whether a city could use its authority to withhold sewage treatment to surrounding towns unless the towns agreed to purchase other services from the city, the Supreme Court believed that anticompetitive conduct of that nature was 'a foreseeable result of empowering the City to refuse to serve unannexed areas' and that 'it [was] clear that anticompetitive effects logically would result from this broad authority to regulate.'[31] Based on its view that Eau Claire's allegedly anticompetitive tying scheme was a foreseeable consequence of the state statute, the Supreme Court determined that 'the Wisconsin statutes evidence a "clearly articulated and affirmatively expressed" state policy to displace competition with regulation in the area of municipal provision of sewer services' and that Eau Claire was entitled to state-action immunity.[32]

The nexus between the state statute and the anticompetitive conduct at issue in *City of Columbia v Omni Outdoor Advertising* was also arguably more attenuated than it appeared to be in *Phoebe Putney*, but the Court in Omni also found state-action immunity to apply.[33] *Omni* involved a challenge to municipal regulation of billboards that insulated a monopolist billboard provider from any competition and 'severely hindered Omni's ability to compete.'[34] The state statute to which the municipality pointed as the basis for the clearly articulated state policy to displace competition was a statute generally authorizing municipalities 'to regulate the use of land and the construction of buildings and other structures within their boundaries.'[35] The Court found the requirement that the suppression of competition be the 'foreseeable result' of what the statue authorized to be 'amply met here.'[36] 'The very purpose of zoning regulation is to displace unfettered business freedom in a manner that regularly has the effect of preventing normal acts of competition . . . . A municipal ordinance restricting the size, location, and spacing of billboards . . . necessarily protects existing billboards against some competition from newcomers.'[37]

Phoebe Putney's narrowed foreseeability standard

In reversing the Eleventh Circuit's decision ('nine-zip'), *Phoebe Putney II* found that the Eleventh Circuit applied the foreseeability test 'too loosely,'[38] and ultimately 'placed narrower bounds on the meaning of foreseeability.'[39] The Court observed that state-action immunity applies to

30 *Id.* at 41.

31 *Id.* at 42.

32 *Id.* at 44 (quoting *Lafayette v Louisiana Power & Light Co.*, 435 U.S. 389, 415 (1978)).

33 499 U.S. 365, 384 (1991).

34 *Id.* at 367–68.

35 *Id.* at 370.

36 *Id.* at 373.

37 *Id.*

38 *Phoebe Putney II*, 568 U.S. 216, 229 (2013).

39 *Diverse Power, Inc. v City of LaGrange*, 934 F.3d 1270, 1275 (11th Cir. 2019).

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non-sovereign political subdivisions of states 'if the anticompetitive effect was the "foreseeable result" of what the State authorized,'[40] but determined that, even though the state authorized acquisition of other hospitals, 'there is no evidence the state affirmatively contemplated that hospital authorities would displace competition by consolidating hospital ownership.'[41]

After *Phoebe Putney*, foreseeability, loosely interpreted, is not enough to demonstrate the clear articulation of a state's intention to displace competition with regulation sufficient to justify application of the state-action doctrine. Instead, the displacement of competition must have been '*the inherent, logical, or ordinary result* of the exercise of authority delegated by the state legislature,' and the state 'must have *foreseen and implicitly endorsed* the anticompetitive effects.'[42]

The Court characterized the Georgia statute authorizing acquisitions by hospital authorities as a 'general power to act,'[43] of which the power to acquire other hospitals was only 'a relatively small subset.'[44] Further, because 'the power to acquire hospitals . . . does not ordinarily produce anticompetitive effects,' the mere 'potential' that an acquisition might reduce competition provided 'too slender of a reed to support' the Eleventh Circuit's inference that anticompetitive acquisitions were foreseeable.[45]

Diverse Power's application of the Phoebe Putney foreseeability standard

Returning finally to *Diverse Power*, Judge Tjoflat observed that 'it's hard to see much legally relevant daylight between the conduct described in *Diverse Power*'s complaint and the facts of *Hallie*.'[46] Both entailed state statutes empowering municipalities to offer utility services within their limits and to deny those services outside of city limits. 'And in both cases, the municipality foreseeably used those two powers to gain leverage in another market.'[47]

The Eleventh Circuit observed, however, that, in spite of the similarities with *Hallie*, under which the city of LaGrange would have been entitled to state-action immunity, 'we're in a post-*Phoebe Putney* world.'[48] '[I]n that world,' the question is not merely whether it would have been foreseeable to the Georgia legislature that LaGrange would use its water monopoly in an anticompetitive way, '[w]e also have to ask if such an anticompetitive move is the "inherent, logical, or ordinary result" of the legislative scheme.'[49] The Court concluded that '[t]he answer to that question is no.'[50] LaGrange might receive immunity for conduct 'directly connected' to its provision of water services – such as 'dividing up water-service territory with neighboring municipalities' – but Judge

40 *Phoebe Putney II*, 568 U.S. at 227 (quoting *Town of Hallie v City of Eau Claire*, 471 U.S. 34, 42 (1985)).

41 *Id.*

42 *Id.* at 229 (*emphasis added*).

43 *Id.* at 231.

44 *Id.*

45 *Id.* at 232.

46 *Diverse Power, Inc. v City of LaGrange*, 934 F.3d 1270, 1276 (11th Cir. 2019).

47 *Id.*

48 *Id.* at 1277.

49 *Id.*

50 *Id.*

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Tjoflat thought it was 'safe to say that the tying of an unrelated service in a different market to the provision of water service' was not the 'inherent, logical, or ordinary' result of a statute authorizing the provision of water service.[51]

Conclusion

Judge Tjoflat's journey from *Phoebe Putney* to *Diverse Power* follows the Supreme Court's evolution in deciding the merit of claims by municipalities and other non-sovereign political subdivisions of states that a state had articulated clearly its intention to supersede application of the antitrust laws. Ultimately, recognizing that 'state-action immunity is disfavored,'[52] the Court settled on a standard for its application under which it would not bend over backwards to conclude that states must have anticipated potential anticompetitive activities by entities to which they delegated regulatory authority. Judge Tjoflat took the 'nine-zip' reversal to heart and applied faithfully the Court's *Phoebe Putney* decision to deny LaGrange's claim to state-action immunity.

Testing the limits of North Carolina Board of Dental Examiners

In its 2015 decision in *North Carolina Board of Dental Examiners v FTC*, the Supreme Court articulated the framework for the applicability of state-action immunity to challenged actions of state regulatory bodies made up of individuals 'engaged in the active practice of the profession [they] regulate . . . .'[53]

At issue in *North Carolina Dental* was whether a board charged by the state with regulating the practice of dentistry, a majority of members of which 'must be licensed dentists engaged in the active practice of dentistry,' could be held responsible under the antitrust laws for an anticompetitive campaign of cease-and-desist letters targeting the provision of teeth-whitening services offered by non-dentists.[54] The Court found that, when a non-sovereign body is comprised of 'active market participants,' it receives the benefits of state-action immunity only if the state (1) clearly articulates its intention to displace competition with regulation, and (2) actively supervises the body's actions and decisions.[55]

In *North Carolina Dental*, the board did not even claim that its activities related to teeth-whitening were subject to active supervision by the state, and the board was thus not immune under the state-action doctrine.[56] With no effort whatsoever to supervise the board's

51 *Id.* at 1277–78.

52 *Phoebe Putney II*, 568 U.S. 216, 236 (2013).

53 574 U.S. 494, 499 (2015) (*North Carolina Dental*).

54 *Id.* at 499–502.

55 *Id.* at 503–04, 511. The active supervision requirement does not apply when the actor seeking state-action immunity is a municipality or other non-sovereign political subdivision of a state. See *Phoebe Putney II*, 568 U.S. 216, 226 (2013) ('[U]nlike private parties, such entities are not subject to the "active state supervision requirement" because they have less of an incentive to pursue their own self-interest under the guise of implementing state policy.').

56 *North Carolina Dental*, 574 U.S. at 504, 515.

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conduct, there were 'no specific supervisory systems' that the Court could review.[57] But it still took the occasion to lay out its views as to the types of supervisory activities in which a state could engage to ensure that decisions of regulatory bodies could receive the benefits of state-action immunity. As an overview, the Court explained that '[a]ctive supervision need not entail day-to-day involvement in an agency's operations or micromanagement of its every decision. Rather, the question is whether the State's review mechanisms provide "realistic assurance" that a nonsovereign actor's anticompetitive conduct "promotes state policy, rather than merely the party's individual interests."'[58] The Court observed that 'the adequacy of supervision . . . will depend on all the circumstances of a case,' but described certain attributes that were 'constant requirements of active supervision':[59]

- '[t]he supervisor must review the substance of the anticompetitive decision, not merely the procedures followed to produce it';
- 'the supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy' and 'the "mere potential for state supervision is not an adequate substitute for a decision by the state"'; and
- 'the state supervisor may not itself be an active market participant.'[60]

SmileDirectClub cases

In 2019, two district courts in the Eleventh Circuit had an opportunity to evaluate whether the supervision of dental boards in their states – Alabama and Georgia – was sufficient to confer state-action immunity. In both cases, the courts determined that factual issues precluded resolution of the active supervision issue on motions to dismiss.

Leeds DDS v Board of Dental Examiners of Alabama

Leeds DDS v Board of Dental Examiners of Alabama concerned an antitrust challenge by SmileDirectClub and one of its affiliated dentists to a cease-and-desist instruction from the Alabama dental board.[61] SmileDirectClub operates an internet-based service that seeks to connect patients seeking clear aligner therapy with licensed dentists. Its business model involves unlicensed employees creating digital images of potential customers' teeth, which can be subsequently evaluated by a licensed dentist to determine whether SmileDirectClub's aligner therapy might be suitable for the customer.[62]

In September 2018, the Alabama dental board alleged that the creation of digital images of patients' teeth constituted the practice of dentistry under an Alabama statute and a dental board regulation, and that SmileDirectClub was engaged in the unauthorized practice of dentistry. It

57 *Id.* at 515.

58 *Id.* (quoting *Patrick v Burget*, 486 U.S. 94, 100–01 (1988)).

59 *Id.*

60 *Id.*

61 382 F. Supp. 3d 1214, 1222 (N.D. Ala. 2019).

62 *Id.* at 1222–23.

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therefore ordered SmileDirectClub to cease-and-desist its practices.[63] SmileDirectClub challenged the order and the regulation on which it was based as an effort to 'protect Alabama dentists from competition' from innovators that can 'provide clear aligner therapy at lower prices than traditional dentists.'[64]

The Court observed that '[t]he powers, duties, and composition of Alabama's Dental Board are nearly identical to those of the North Carolina Dental Board.'[65] Both were created by state law, empowered to regulate the practice of dentistry and enforce state policy against unauthorized practice of dentistry, and controlled by active market participants.[66] The Court therefore concluded that 'the Alabama Board is also a "nonsovereign actor controlled by active market participants,"' and that, as such, the principles of *North Carolina Dental* apply to the Alabama dental board,[67] but the Court found that a decision on whether the board is entitled to state-action immunity would be 'premature' on a motion to dismiss.[68]

Although it did not reach any determination as to whether the state actively supervised the dental board, the court expressed some skepticism that its regulatory structure could ultimately support such a conclusion.[69] The Court explained that the Alabama legislature in 2016 adopted a statute that responded to the *North Carolina Dental* decision by creating a regulatory review apparatus evidently intended to show active supervision of state regulatory bodies.[70] Under the statute, regulations by boards comprised of active market participants are submitted to the Legislative Services Agency (LSA) for review. If the LSA determines that the rule will not decrease competition, then no further action is required. But if the LSA determines that a new rule is likely to significantly lessen competition, it is submitted to a legislative committee with the power to approve, disapprove, disapprove with suggested amendment, or allow the agency to withdraw and modify the rule.[71]

The Court noted that the state's procedures 'may "suffice to make the Board's anticompetitive conduct the State's own" and therefore immunize the Board from antitrust liability,'[72] but found the necessary factual record on which it could make that determination on a motion to dismiss 'simply not present.'[73] The Court observed, however, that the review of the dental board's

63 *Id.* at 1223–24.

64 *Id.* at 1224.

65 *Id.* at 1235.

66 *Id.*

67 *Id.*

68 *Id.* at 1237.

69 Another issue on which the factual record could not support a decision at the motion to dismiss stage was whether the state statute defining the practice of dentistry included within the definition the digital imaging performed by SmileDirectClub employees (without a licensed dentist on site). *Id.* If so, and the dental board's decision were 'enshrined in statutory text,' the court believed state-action immunity might apply, regardless of whether the state actively supervised the board's decisions. *Id.* at 1238–39 and n.7.

70 *Id.* at 1240–41.

71 *Id.* at 1241.

72 *Id.* at 1239 (quoting *North Carolina Dental*, 574 U.S. 494, 506 (2015) (*alterations omitted*)).

73 *Id.*

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actions consisted of a 'memo to file' that spent a 'mere four sentences' discussing the challenged regulation before concluding that it '[did] not affect competition at all.'[74] Based on this cursory determination, the regulation did not reach the stage under the state's review process 'at which its substance would have been reviewed.'[75] The Court found the 'memo to file' insufficient standing alone to establish the requisite active supervision necessary to entitle the dental board to state-action immunity, and therefore denied the board's motion to dismiss.[76]

SmileDirectClub, LLC v Georgia Board of Dentistry

SmileDirectClub faced similar issues in the state of Georgia. To curtail SmileDirectClub's activities in Georgia, the state dental board adopted a new regulation requiring that digital scans performed for purposes of fabricating aligners be made under the supervision of a licensed dentist.[77]

The Court determined on a motion to dismiss that the dental board had 'not satisfied the active supervision requirement.'[78] The Court noted that Georgia's governor signed a 'certification of active supervision,' but refused to determine that that certificate conclusively resolved the issue because SmileDirectClub raised a number of allegations in its complaint concerning the procedures that preceded creation of the certification.[79] 'Only discovery will determine whether the Board provided all relevant information to the Governor, whether the proposed amendment was subjected to any meaningful review by the Governor, or whether the certification of active supervision was merely "rubberstamped" as a matter of course.'[80]

Next steps in the SmileDirectClub cases

Both cases are now on appeal to the Eleventh Circuit.[81] Decisions in these cases should help illuminate what state procedures are necessary to satisfy the active supervision requirement as laid out in *North Carolina Dental*.

74 *Id.* at 1240.

75 *Id.*

76 *Id.* at 1241.

77 *SmileDirectClub, LLC v Ga. Bd. of Dentistry*, No. 1:18-cv-02328, 2019 WL 3557892, at *1 (N.D. Ga. May 8, 2019).

78 *Id.* at *5.

79 *Id.*

80 *Id.*

81 *Leeds v Jackson*, No. 19-11502 (11th Cir.); *SmileDirectClub, LLC v Battle*, No. 19-12227 (11th Cir.).

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